Nguang Chan Sdn Bhd v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEALS NO W–05–28 OF 2000 AND W–05–29 OF 2000
LAMIN PCA, ABDUL HAMID MOHAMAD AND ABDUL KADIR SULAIMAN JJCA
8 MARCH 2001

Constitutional Law *— Constitution — Infringement of — Whether s 28B(3) of the Trade Description Act 1972 was ultra vires art 145(3) of the Federal Constitution and was void to that extent*

Criminal Procedure *— Prosecution — Conduct of prosecution under the Trade Description Act 1972 — Whether assistant controller of trade descriptions lawfully empowered to conduct prosecution — Federal Constitution art 145(3) — Trade Description Act 1972 s 28(3)*

The appellant was charged with two offences under s 3(1)(b) of the Trade Description Act 1972 ('the Act') in the magistrate court. An assistant controller of trade descriptions appeared in court to conduct the prosecution of the case. Before the trial concluded, the magistrate transmitted the record of proceedings to the High Court and placed before it for determination the following questions, namely: (i) whether s 28B(3) of the Act which allows proceedings to be conducted by an assistant controller of trade descriptions is ultra vires art 145(3) of the Federal Constitution ('FC'); (ii) whether the institution by the assistant controller of trade descriptions of proceedings under the Act contravenes art 145(3) of the FC. The issues for determination in this appeal were the same as those that came up for deliberation before the High Court judge.

Held, dismissing the appeal by the respondent and allowing the cross-appeal by the appellant:

(1) Section 380(ii)(b) of the Criminal Procedure Code ('CPC') (prior to the amendment in 1998) is unconstitutional as it sought to oust the powers of the Attorney General under s 376(1) of the CPC to control and direct all criminal prosecutions and it stands in the face of his general powers under art 145(3) of the FC (see pp 134H–135A–B).

(2) There was no avenue for a presumption to arise in that since the complaint was made by a public officer in his official capacity, it would be presumed that the complaint was made by an officer under 'the control and direction' of the federal attorney general acting as a public prosecutor consonant with art 145 of the FC and s 376(1) of the CPC. By lodging a complaint as was done by the assistant controller, it could be said that he did institute the proceeding. Whatever action he took he would still be under under the 'supervision' of the controller which would be 'subject

to the general direction and control of the minister' and therefore in direct conflict with art 145(3) of the FC (see p 141E–F, H–I).

(3) In the present case, it was clear that the prosecution was conducted by an assistant controller of trade descriptions and he had his purported authority to do so under s 28B(3) of the Act, which was clearly in contravention of art 145(3) of the FC. There was no way that he could hide under or get the protection of s 376(1) of the CPC in view of what was said of the effect of s 380 of the CPC before the 1998 amendment. In the circumstances, s 28(3) of the Act is ultra vires art 145(3) of the FC and the prosecution conducted is null and void (see pp 141E–G, 142A).

[**Bahasa Malaysia summary**

Perayu telah dituduh kerana dua kesalahan di bawah s 3(1)(b) Akta Perihal Dagangan 1972 ('Akta tersebut') di mahkamah majistret. Seorang penolong pengawal perihal dagangan telah hadir di mahkamah untuk mengendalikan pendakwaan kes. Sebelum perbicaraan selesai, majistret telah menghantar laporan prosiding ke Mahkamah Tinggi dan meletakkannya untuk ditentukan persoalan-persoalan berikut, terutamanya: (i) sama ada s 28B(3) Akta tersebut yang membenarkan prosiding dikendalikan oleh seorang penolong pengawal adalah ultra vires perkara 145(3) Perlembagaan Persekutuan ('PP'); (ii) sama ada permulaan oleh penolong pengawal perihal dagangan terhadap prosiding di bawah Akta tersebut bertentangan dengan perkara 145(3) PP. Persoalan-persoalan untuk ditentukan di dalam rayuan ini adalah sama dengan yang timbul untuk pertimbangan hakim Mahkamah Tinggi.

Diputuskan, menolak rayuan responden dan membenarkan rayuan balas perayu:

(1) Seksyen 380(ii)(b) Kanun Acara Jenayah ('KAJ') (sebelum pindaan 1998) adalah tidak menurut perlembagaan kerana ia mencuba untuk menyingkir kuasa penolong pengawal di bawah s 376(1) KAJ untuk mengawal dan mengarah semua pendakwaan jenayah dan ia menghalang kuasa amnya di bawah perkara 145(3) PP (lihat ms 134H–135A–B).

(2) Tiada ruang untuk menimbulkan satu andaian di mana memandangkan aduan tersebut telah dibuat oleh seorang pegawai awam di dalam kuasa tugas rasmi beliau, ia akan dianggap bahawa aduan tersebut telah dibuat oleh seorang pegawai di bawah 'kawalan dan arahan' Peguam Negara Persekutuan yang bertindak sebagai seorang Pendakwa Raya yang sejajar dengan perkara 145 PP dan s 376(1) KAJ. Dengan membuat satu aduan sepertimana yang telah dibuat oleh penolong pengawal, boleh dikatakan bahawa beliau telah memulakan prosiding tersebut. Apapun tindakan yang beliau telah ambil beliau masih di bawah

'pengawasan' pengawal tersebut yang akan 'tertakluk kepada arahan dan kawalan am menteri' dan oleh itu bertentangan secara langsung dengan perkara 145(3) PP (lihat ms 141E–F, H–I).

(3) Di dalam kes ini, adalah jelas bahawa pendakwaan tersebut telah dikendalikan oleh seorang penolong pengawal perihal dagangan dan beliau di dalam kuasa beliau yang dimaksudkan itu telah berbuat demikian di bawah s 28B(3) Akta tersebut, yang dengan jelas bertentangan dengan perkara 145(3) PP. Tiada cara apapun yang dapat beliau bersembunyi atau berselindung di bawah s 376(1) KAJ berdasarkan apa yang dinyatakan terhadap keberkesanan s 380 KAJ sebelum pindaan 1998. Di dalam keadaan ini, s 28(3) Akta tersebut adalah ultra vires perkara 145(3) PP dan pendakwaan yang telah dikendalikan adalah batal dan tak sah (lihat ms 141E–G, 142A).]

Notes

For a case on infringement of Constitution, see 3(1) *Mallal's Digest* (4th Ed, 2000 Reissue) para 1406.

For a case on the right to conduct criminal prosecution, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) para 2277.

Cases referred to

Johnson Tan Han Seng v PP [1977] 2 MLJ 66 (refd)
Kyohei Hosol v PP [1998] 1 CLJ 1063 (refd)
Long bin Samat & Ors v PP [1974] 2 MLJ 152 (refd)
Perumal v PP [1970] 2 MLJ 265 (refd)
PP v Datuk Harun bin Hj Idris & Ors [1976] 2 MLJ 116 (refd)
PP v Jamil bin Jilap [2000] 5 MLJ 317 (refd)
PP v Lee Ming & Anor [1998] 4 MLJ 113 (refd)
PP v Manager MBf Building Services Sdn Bhd [1998] 1 MLJ 690 (refd)
Repco Holdings Bhd v PP [1997] 3 MLJ 681 (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 30(1)
Criminal Procedure Code ss 3, 133(1), 376(i), 380(ii)(b)
Criminal Procedure Code (Amendment) Act 1967 (Act 25/67) s 18
Criminal Procedure Code (Amendment) Act 1998 (Act A1015) ss 18, 377, 380, 381,
Employees Provident Fund Act 1951 s 18(1)
Federal Constitution arts 4(1), 145(3)
Forest Ordinance (Sarawak Cap 126) ss 92A
Immigration Act 1959/1963 ss 55B(1)(3), 58(2)
Immigration Rules 1963 ss 39(b)
Securities Commission Act 1993 ss 39, (1), (2), 86
Securities Industry Act 1983 ss 126, (2)

Trade Descriptions Act 1972 ss 3(1)(b), 18(2), 26, (2), (2)(j) (3), 28B(3)
Wild Life Protection Ordinance (Sarawak) s 39

Appeal from: Criminal Application No 44–7 of 1998 (High Court, Kuala Lumpur)

Cyrus Das (*K Mohan* with him) (*Shook Lin & Bok*) for the appellant in Criminal Appeal No W–05–28 of 2000 and for the respondent in Criminal Appeal No W–05–29 of 2000.

Vong Poh Fah (Attorney General's Chambers) for the respondent in Criminal Appeal No W–05–28 of 2000 and for the appellant in Criminal Appeal No W–05–29 of 2000.

Lamin PCA. : For the purpose of the deliberation on the case before us, we reproduce below the text of cl (3) of art 145 of the Federal Constitution ('the Constitution'):

> 145(3) The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a syariah court, a native court or a court-martial.

This clause states categorically that the Constitution, the supreme law of the land, confers upon the attorney general the power to institute, conduct or discontinue any proceedings for an offence 'other than proceedings before a Syariah Court, a Native Court or a Court Martial' because of the words 'shall have power'. However, he can only exercise that power pertaining to proceedings only in a civil court because the clause expressly does not allow him to appear in other courts, namely any Syariah Court in the country, the Native Court and any Court Martial. Of course to institute a proceeding etc shall be at his discretion. His power relates to proceedings 'for an offence' in a civil court meaning, in our view, from a magistrate court to the highest civil court in the country, namely the Federal Court.

Next, if we may observe, cl (3) concerns itself only with proceedings 'for an offence'. The word 'offence' is not qualified as to whether it is seizable or non-seizable offence. From the reading of the clause, its intention can be no other than to confer upon the attorney general a general power to institute etc, and so the word 'offence' must cover both seizable and non-seizable offences.

The next question, it may be asked, whether the word 'offence' refers to any offence as prescribed under any law Federal or State. (Of course matters within the jurisdiction of a Syariah Court, a Native Court or a Court Martial are outside the purview of the attorney general). It would appear to be affirmatively so. Does this make the attorney general the exclusive authority or the sole authority in the whole country, having the power to 'institute, conduct or discontinue' any proceedings in any civil court? Clause (3) does not stipulate an offence under 'any law'. The words 'any law' do not appear in cl (3) however. Otherwise, it would have been to that extent clearer, for in terms of definition under art 160 of the Constitution, they would 'include' any 'written law', be it in force 'in the Federation or

any part thereof'. If that had been the case, any law passed after Merdeka Day which was 'inconsistent with' the Constitution would immediately attract art 4(1) of the Constitution, and it would be struck down as being void to the extent of its inconsistency. Both the Federal and State legislatures have been known to have enacted laws investing certain Federal and State authorities with the power to conduct prosecutions for offences as prescribed in the respective acts and enactments, some of which have been brought before the court and dealt with as each court thought appropriate or correct. Some such laws are for example, Securities Industry Act 1983 ('SIA'), Securities Commission Act 1993 ('SCA'), see *Repco Holdings Bhd v PP* [1997] 3 MLJ 681 ('*Repco*'); Environmental Quality Act 1974, see *PP v Manager MBF Building Services Sdn Bhd* [1998] 1 MLJ 690; Immigration Act 1959/63 ('IA'), see *Kyohei Hosol v PP* [1998] 1 CLJ 1063; Forest Ordinance (Sarawak Cap 126) ('FO'); Wild Life Protection Ordinance (Sarawak) ('WPO'), see *PP v Lee Ming & Anor* [1998] 4 MLJ 113; Sabah Forests Enactment 1968, see *PP v Jamil bin Jilap* [2000] 5 MLJ 317.

Perhaps the omission of the words 'any law' in cl (3) was intentional. In so far as the prosecution of offences under the Penal Code, there is no doubt that the attorney general is the sole authority having the power of control and direction in respect of it. The Criminal Procedure Code ('CPC') makes express provisions as spelled out in s 376(i) of the CPC and it reads:

> (i) The Attorney-General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under this code.

As is provided for under cl (3) of art 145 of the Constitution, the attorney general has been invested by the supreme law of the land with the power 'to institute, conduct or discontinue any proceedings for an offence', and s 3 of the CPC stipulates 'All offences under the Penal Code shall be inquired into and tried according to the provisions' of the CPC (Emphasis added.) while the officer responsible for the control and direction of 'all criminal prosecutions and proceedings' in respect of 'all offences under the Penal Code' is the public prosecutor and the attorney general 'shall be' the public prosecutor (s 376(i) of the CPC).

So, for all offences under the Penal Code, it is the attorney general who is the sole authority having the power to institute, conduct and discontinue their prosecutions and proceedings (For the meaning of the words 'institute', 'conduct' and 'discontinuance' see *Perumal v PP* [1970] 2 MLJ 265, *PP v Datuk Harun bin Hj Idris & Ors* [1976] 2 MLJ 116 and *Mimi Kamariah Majid on Criminal Procedure in Malaysia*, 2nd Ed, pp 131–141.)

Now, what about the prosecutions and proceedings of offences under any other law? By what procedures are they governed and who has the power of control and giving directions in respect of them. Section 3 of the CPC states:

> 3 Trial of offences under the Penal Code and other laws.
>
> All offences under the Penal Code shall be inquired into and tried according to the provisions hereinafter contained, and all offences under any other law shall be inquired into and tried according to the same provisions subject however to any written law for the time being in force regulating the manner or place of inquiring into or trying such offences.

The second limb of this section provides that 'and all offences under any other law shall be inquired into and tried according to the same provisions, subject however to any written law for the time being in force regulating the manner or place of inquiring into or trying such offences.' It is quite clear from this provision that the prosecution of 'all offences' under other written laws shall be governed by the 'same provisions' of the CPC, but they may be subject to any written law 'regulating the manner or place of inquiring into or trying such offences.' Likewise it appears, therefore s 376(i) of the CPC will also govern the prosecution of all offences under any other law meaning its 'control and direction' are also in the hands of the attorney general, because it says that he has the power of 'control and direction of all criminal prosecutions and proceedings under this code'. However, other written laws may only regulate 'the manner or place of inquiring into or trying such offences'.

That is not the end of the matter. We have s 380 of the CPC to contend with and to give effect to. It reads:

> 380 Prosecutions in summary non-seizable cases
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> Notwithstanding anything in this Chapter contained —
>
> (i) any public officer may prosecute in any court in any case or class of cases in which he is by any written law authorized to prosecute in such court;
>
> (ii) in summary non-seizable cases in the court of a Magistrate —
>
> (a) the Public Prosecutor or a Deputy Public Prosecutor or a Police Officer may appear and conduct any prosecution;
>
> (b) any officer of any Government department or to any local authority or statutory authority or any person employed by any local authority or statutory authority may appear and conduct any prosecution for an offence against any written law which it is the duty of the said department or authority specially to enforce;
>
> (c) any private person may appear in person or by advocate or, in the State of Terengganu, by a pleader and prosecute for an offence against his own person or property.

Under s 380(ii)(b) of the CPC, any officer of the government department or any local authority or statutory authority or any person employed by any of them is authorized to appear and conduct any prosecution for an offence 'against any written law which it is the duty of the said department or authority specially to enforce'. This subsection was inserted in 1967 (s 18 of the CPC Amendment Act 25/67). We believe it was initiated to ease the heavy burden of the attorney general and his officers, and to allow the officers of the respective government departments and statutory authorities

to conduct the prosecution of minor offences (non-seizable) against their relevant laws. The constitutional validity of this provision is questionable especially when the section (s 380 of the CPC) is prefixed with the words 'Notwithstanding anything in this chapter contained …'. The effect of this is to oust the powers of the attorney general under s 376(i) of the CPC to control and direct all criminal prosecutions. Perhaps this is permissible, but more importantly it stands in the face of his general powers under art 145(3) of the Constitution and will immediately attract art 4(1) of the Constitution. In April 1998, under the Amendment Act A1015, the whole s 380 of the CPC was completely amended and replaced with a new s 380 which reads:

> 380 Notwithstanding anything in this Chapter contained, any private person may appear in person or by advocate and prosecute for an offence against his own person or property in a non-seizable case in the Court of a Magistrate.

This new s 380 of the CPC requires no further discussion as it has become irrelevant in the context of the present case. However in the same Amendment Act 1998, s 377 of the CPC was amended by substituting paras (a) and (b) with completely new paras (a) and (b). The new para (b) is, in our view, constitutionally palatable because the person named therein, such as an officer of any government department, an officer of any local or statutory authority and any person employed by them may conduct prosecution, but must be authorized in writing by the public prosecutor while still remaining under his control and direction. Paragraph (b) reads:

> (b) subject to the control and direction of the Public Prosecutor, by the following persons who are authorized in writing by the Public Prosecutor:
> (1) an advocate;
> (2) a police officer not below the rank of Inspector;
> (3) an officer of any Government department;
> (4) an officer of any local authority;
> (5) an officer of any statutory authority or body; or
> (6) any person employed or retained by any local authority or any statutory authority or body.

With this new para (b), it emphasizes further the position of the attorney general as regards his overall authority 'to institute, conduct or discontinue' any proceedings for an offence exercisable at his discretion. In our view whether with or without the 1998 amendment, the powers of the attorney general under art 145(3) of the Constitution remains unaffected.

The instant case before us originated in the Magistrate's Court Kuala Lumpur, where a private limited company, Nguang Chan Sdn Bhd was charged on 21 March 1995 with two offences (committed on 25 November 1994) both being offences under s 3(1)(b) of the Trade Descriptions Act 1972 (Act 87) ('the Act'), punishable under s 18(2) of the Act. An assistant controller of trade descriptions appeared in court to conduct the prosecution of the case. Before the trial concluded, the learned magistrate transmitted the record of proceedings to the High Court and placed before it for determination the following questions, namely:

1 Whether s 28B(3) of the Act which allows proceedings to be conducted by an assistant controller of trade descriptions is ultra vires art 145(3) of the Constitution;

2 Whether the institution by the assistant controller of trade descriptions of proceedings under the Act contravenes art 145(3) of the Constitution.

Section 28B(3) of the Act reads:

(3) Any prosecution in respect of an offence under this Act may be conducted by an assistant controller

As we shall also be discussing the effect of s 26 of the Act in relation to s 28B(3) of the Act, for convenience we reproduce sub-ss (2) and (3) of s 26 of the Act. They read:

(2) The Controller shall subject to the general direction and control of the Minister have supervision in all matters relating to the enforcement of this Act and the controller and the Deputy Controller shall perform such duties and exercise such powers and functions conferred upon them and upon an Assistant Controller by this Act.

(3) All officers appointed under this section shall be deemed to be public servants within the meaning of the Penal Code applicable.

There is nothing to suggest from s 28B(3) of the Act that the assistant controller when acting under sub-s (3) that he is obliged to get either written authorization or consent from the attorney general or any Deputy Public Prosecutor. It appears that he is allowed to act independently. However, he is under general 'supervision' by the controller, who in turn the controller himself is under 'the general direction and control of the minister' when performing his functions such as supervising 'in all matters relating to the enforcement of this Act' (see s 26(2)). In *Repco*, Gopal Sri Ram JCA (sitting as High Court Judge) was faced with the question as to whether sub-s (2) of s 126 of the SIA and sub-s (2) of s 39 of the SCA were in conflict with art 145(3) of the Constitution. If we may reproduce the whole s 126 of SIA and s 39 of the SCA as follows:

Section 126 of the SIA reads:

126 (1)No prosecution for any offence under this Act shall be instituted except with the consent in writing of the Public Prosecutor.

(2) A prosecution for any offence against any provision of this Act may be conducted by the Registrar or by any officer authorized in writing by the Registrar or by any officer authorized in writing by the Chairman of the Commission.

Section 39 of the SCA reads:

39 (1)No prosecution for any offence under this Act shall be instituted except with the consent in writing of the Public Prosecutor.

(2) Any officer of the Commission authorized in writing by the Commission may conduct any prosecution of any offence under this Act.

The learned deputy public prosecutor cited before the court a couple of celebrated authorities, namely *Long bin Samat & Ors v PP* [1974] 2 MLJ 152 and *Johnson Tan Han Seng v PP* [1977] 2 MLJ 66, where Suffian LP in both cases made his notable contributions in his judicial pronouncements in regard to the position and powers of the attorney general as found in the Constitution. We have but great respect for all his propositions in this respect. Gopal Sri Ram JCA had this to say (p 689):

> The importance of the propositions formulated by the learned Lord President in these two cases is that, as a matter of public law, the exercise of discretion by the attorney general in the context of art 145(3) of the Constitution is put beyond judicial review.

In *Repco* a public limited company was charged for making certain statement which the securities commission considered having contravened s 86 of the SIA, and the commission then instituted proceedings against it. On the day of hearing in the Sessions Court Kuala Lumpur, counsel for *Repco* took a preliminary objection to the locus standi of the two officers (Ms Foo Lee Mei and Ms Seow Siew Mei) of the commission who appeared to conduct the prosecution. As the arguments involved constitutional issues, the sessions judge adjourned the hearing and transmitted the record to the High Court under the authority of s 30(1) of the Courts of Judicature Act 1964 ('CJA') to determine the constitutionality of the two subsections mentioned earlier. It was argued that they were ultra vires art 145(3) of the Constitution. Gopal Sri Ram JCA declared that the two subsections were ultra vires art 145(3) of the Constitution and therefore are null and void. With regard to sub-s (2) of s 126 of SIA, he had this to say (p 690):

> In my judgment, having regard to the authorities read before me, the expression 'conduct' appearing in art 145(3) of the Constitution, and in the two impugned subsections carries the same meaning. Since the Constitution exclusively authorizes the attorney general to conduct prosecutions, it must follow, as night follows day, that no other authority may be lawfully empowered to exercise that function. Therefore, it is my opinion, that s 126(2) of the SIA is ultra vires art 145(3) of the Constitution, save to the extent shall now indicate.
>
> Subsection (2) of s 126 of the SIA refers to the conducting of a prosecution by the registrar of companies or by someone authorized by such registrar in writing. As a matter of practice, the registrar of companies is usually a senior member of the judicial and legal service. He or she is normally gazetted as a deputy public prosecutor. So, if the registrar of companies is gazetted a deputy public prosecutor, and in such capacity conducts a prosecution of an offence under the SIA, that would not be caught by art 145(3) of the Constitution. But the chairman of the securities commission is not placed on an equal footing. He is therefore not authorized lawfully, that is to say constitutionally, to authorize or to conduct prosecutions under the SIA.
>
> Neither does s 380(i) of the CPC, relied on by the prosecutors before the sessions court, provide any assistance to the securities commission. As pointed out by the learned deputy public prosecutor, the expression 'public officer'

> appearing in that section refers to members of the public service. While for the purpose of carrying out their duties, members and servants of the securities commission are deemed to be public officers, they do not fall within the scope of s 380(i) of the CPC.

(Section 381 of the CPC mentioned above was the one inserted by the 1967 amendment)

With regard to s 39 of the SCA, if we may observe that in the light of sub-s (1), we wonder why it was necessary to have sub-s (2) at all. With a clear injunction in sub-s (1) that 'no prosecution for any offence under this Act shall be instituted except with the consent in writing of the public prosecutor', then the whole of sub-s (2) would have no legal effect. However sub-s (2) was deleted in 1998 by Act A1041.

In *Kyohei Hosoi v PP*, the learned judge of the High Court Kuala Lumpur, with a similar issue at hand, found in *Repco* the answer. The case concerned a constitutional question as to whether s 58(2) of the IA was ultra vires art 145(3) of the Constitution. Two persons were charged for an offence under s 39(b) of the Immigration Rules 1963 and s 55B(1)(3) of the IA respectively in the Magistrates' Court at Melaka. Both prosecutions were instituted pursuant to sanctions to prosecute given by the director general of immigration in accordance with s 58(2) of the IA which reads:

> (2) No prosecution shall be instituted in respect of an offence against this Act without the sanction in writing of the Director General or of the Public Prosecutor or his Deputy.

The learned magistrate stayed the proceedings and transmitted the record to the High Court under s 30(1) of the CJA for determination as to the constitutionality or otherwise of sub-s (2) in the face of art 145(3) of the Constitution. The learned judge relied wholly on the decision of *Repco* and declared that s 58(2) of the IA was ultra vires art 145(3) of the Constitution.

Similarly, if we may observe, the IA does not have a clear injunction as in the form and substance as in sub-s (1) of s 39 of the SCA. So, the learned judge in *Kyohei Hosoi* made a ruling only affecting that part of sub-s (2) of s 58 of the IA, for he said (p 1070):

> The result of s 58(2) of the Act giving power to, inter alia, the director general of immigration to sanction the institution of a prosecution means that his power is parallel to that of the attorney general. As I said earlier art 145(3) of the Constitution confers this power exclusively on the attorney general. In the premises, that part of s 58(2) of the Act which empowers the director general of immigration to sanction a prosecution is inconsistent with art 145(3) of the Constitution.

In *Lee Ming*, the learned judge of the High Court, Kuching had to decide on the constitutionality of s 92A of the FO and s 39 of the WPO. In that case, both the accused were originally charged in the sessions court under the FO and the WPO, and the prosecution was conducted by a legal officer of the state attorney general chambers, Mr Lim Heng Choo. The sessions court judge followed *Repco* and ruled that the prosecuting officer had no

written authorization to prosecute, and thus the trial was declared a nullity. The public prosecutor brought the case up to the High Court by way of revision with the view to have the decision of the sessions court judge revised. The prosecuting officer had relied on a written authority dated 18 May 1996 to prosecute signed on behalf of the director of forests and director of wildlife. The letter of authorization certified and confirmed that Mr Lim was 'lawfully entitled to discharge the function of a forest officer' under 'the FO, particularly s 92A of the FO.'

Section 92A of the FO reads:

> Prosecution in respect of offences under this Ordinance or by any subsidiary legislation made hereunder may be conducted by—
>
> (a) The State Attorney General or any legally qualified officer authorized by him;
>
> (b) The Director; or
>
> (c) Any forest officer or any other public officer generally or specially authorized in that behalf by the Director.

Ian Chin J decided thus:

> That provision is surely, in the light of *Repco Holdings Bhd v PP* which I respectfully follow, unconstitutional, null and void as it allows persons other than the federal attorney general to institute, conduct or discontinue any proceedings for an offence. Therefore, whatever the nature of the authorization that was given pursuant to that provision, did not clothe the prosecution officer with authority to prosecute. In this regard, the learned sessions court judge was right in concluding that the prosecution was a nullity.
>
> This brings me to the third charge which is under s 22(2) of the Sarawak Wild Life Protection Ordinance. The offence was for being in possession of a protected plant which carries a sentence of imprisonment of one year and a fine of RM25,000. The provision enabling prosecution in that Ordinance is in the following section:
>
> 39 Prosecutions in respect of offences committed under this Ordinance or any rule made hereunder may be conducted by a Wildlife Officer, or by any other person specially authorized in writing in that behalf by the Director.
>
> In my view, that provision suffers the same unconstitutionality and nullity because it vested prosecutorial authority on a person other than the federal attorney general and without the federal attorney general having any discretion in the institution, conduct or discontinuance of the proceedings under the Sarawak Wild Life Protection Ordinance.

Before the sessions court, the learned deputy public prosecutor relied on s 380(ii)(b) of the CPC (ie as amended by s 18 of the CPC Amendment Act 1967 [Act 25/67] — reproduced earlier). He submitted that since the prosecuting officer was an officer of a government department, he was entitled to prosecute. The two offences at the time of commission (4 August 1993) and by definition then were non-seizable offences and therefore they came within the meaning of s 380(ii)(b) of the CPC. The learned judge then decided thus:

> … It is clear from the wording of s 380(ii)(b) of the CPC, which I have earlier reproduced, that the conduct of prosecution was taken totally out of the hands of the federal attorney general and vested in officers of government departments, local authority or statutory authority and there is not even a need to obtain sanctions to prosecute from the attorney general. It must follow from the decision of *Repco Holdings Bhd v PP* that s 380(ii)(b) of the CPC is also unconstitutional and a nullity. Not only that, every legislation, be it state or federal, which attempts to clothe any person other than the federal attorney general with the power to institute, conduct or discontinue any prosecution for an offence would also be unconstitutional and a nullity.

As we have said earlier that the purpose of the amendment by bringing in s 380(ii)(b) of the CPC was in our own judgment, an attempt not to burden the attorney general with less serious matters or day to day matters that can appropriately be dealt with by the respective departments and local and statutory authorities, such as by allowing them to carry out the prosecution of non-seizable offences in other written laws specially affecting the duties and responsibilities of the respective departments and authorities. We certainly agree with the above suggestion, but their powers should still be subject to the powers of the attorney general as laid down in s 376(i) of the CPC. Perhaps the words:

> notwithstanding anything in this Chapter contained —

that govern s 380 of the CPC be replaced with the words 'subject to s 376(i) of the CPC.' This has in fact been done by the 1998 amendment, and it is now found in the new para (b) to s 377 of the CPC. Since the amendment in 1967, the powers to conduct prosecution of offences in other written laws by various, officials other than the public prosecutor and his deputies have not been seriously challenged until *Repco*. That suggests that the attorney general was prepared to allow those other authorities to conduct the prosecution of offences in those other laws so that the problems connected therewith would expeditiously be resolved.

In the light of the above, we do not think it is necessary to discuss the decision in the case of *PP v BATA (M) Bhd* [2000] 3 CLJ 433, where the learned judge held a view contrary to that held in *Lee Ming* and *Jamil Jilap*. The learned judge in *BATA* was dealing with the operation of s 18(1) of the Employees Provident Fund Act 1951 ('EPFA') and to ascertain as to whether the conduct of a prosecution by an EPF officer under the said section contravened art 145(3) of the Constitution. Section 18(1) of the EPFA reads:

> Prosecutions in respect of any offence against the provisions of this Act or of any regulations or rules made thereunder may be conducted by any officer in writing in that behalf by the Chairman of the Board.

There is just another matter. The learned judge in the present case in his grounds of judgment (reported in [2000] 4 AMR 3927 at p 3933) did say this:

> I now move to the second question, whether the institution by the assistant controller of trade descriptions of proceedings under the Act contravenes art 145(3) of the Constitution. The short answer to this is, if the assistant

controller of trade descriptions was the person who took the initiative to institute the proceedings, then the proceedings are a nullity.

But did he institute the proceedings? The record shows that a magistrate issued a summons on 10 February 1995 in respect of the charges for the two offences against the accused company. It was issued on a written complaint lodged by a public servant, in this case the assistant controller of trade descriptions, Mohd Rabani Hj Sayur. The summons was issued under Chapter XV of the CPC.

In the present case, the judge did not view it as a case being 'instituted' by a public servant who was the assistant controller of trade descriptions otherwise as he had said the proceedings would have been a nullity. To him, the case emerged into court as a result of a written complaint lodged by the assistant controller of trade descriptions, Mohd Rabani Hj Sayur and then a summons was issued by a magistrate under Chapter XV of the CPC. Since the complaint was lodged by a public servant and not by a private person, then sub-s (1) of s 133 of the CPC before the amendment did not apply so that his complaint need not be examined on oath before the issuance of the summons, for he said:

> It was not necessary to examine the officer acting in his official capacity as the complaint was made on an official basis and the presumption was that the complaint made under the CPC was made by an officer under the control and direction of the federal attorney general acting as public prosecutor consonant with art 145 of the Constitution and s 376(1) of the CPC.

To the learned judge, since 'the complaint was made by a public officer in his official capacity, and it was not necessary for the magistrate to examine him on oath, and in such a case a presumption could arise in that the complaint was made by an officer under 'the control and direction' of the federal attorney general acting as a public prosecutor consonant with art 145 of the Constitution and s 376(1) of the CPC'. For one thing, it is not clear in the mind of the judge whether by 'lodging' a complaint it could or could not amount to 'instituting' a proceeding. Be that as it may in our own view, with the greatest of respect, we see no avenue for a presumption to operate here. In the present case, it was clear that the prosecution was conducted by an assistant controller of trade descriptions and he had his purported authority to do so under s 28B(3) of the IA, and as we have said, it was clearly in contravention of art 145(3) of the Constitution. So the prosecution was a nullity. There was no way that he could hide under or get the protection of s 76(i) of the CPC, in view of what we said of the effect of s 380 of the CPC before the 1998 amendment.

That is all that is required to be said about the proceedings. However by lodging a complaint as was done by the assistant controller, did not help to salvage the case in any way. By so doing it could be said that he did institute the proceedings. However whatever action he took he would still be under the 'supervision' of the controller (s 26(2)(j) of the Act which would be 'subject to the general direction and control of the Minister' and therefore in direct conflict with art 145(3) of the Constitution and to that extent the said provision would be struck down as null and void (art 4(1) of the Constitution).

In the circumstances, we therefore rule that s 28B(3) of the Act is ultra vires art 145(3) of the Constitution, and that the prosecution conducted was null and void.

In the result the appeal by the attorney general as per the notice of appeal dated 27 April 2000 is dismissed.

The appeal by the accused's company as per the notice of appeal dated 27 April 2000 is allowed.

Respondent's appeal dismissed and appellant's cross-appeal allowed.

Reported by Moy Saw Han